Khaw Poh Chhuan v Ng Gaik Peng & Ors

FEDERAL COURT (MALAYA) — CIVIL APPEAL NO 02-239-1992
CHONG SIEW FAI CJ (SABAH & SARAWAK), MOHD AZMI AND PEH SWEE CHIN FCJJ
20 JANUARY 1996

Civil Law Act *— Assignment — Intestate estate — Agreement to assign beneficial interest — Whether assignment was absolute and unconditional — Whether s 4(3) of the Civil Law Act 1956 had been complied with — Whether assignment valid — Whether compliance with s 4(3) a prerequisite to validity — Civil Law Act 1956 s 4(3)*

Land Law *— Restraints on dealings — Caveats — Residuary beneficiary of intestate estate assigned her share of interests for consideration — Entry of caveat over interest in land by assignee — Family settlement agreement made by all beneficiaries — Consent order granted by court — Assignee not made a party — Land sold to third party pursuant to agreement — Transfer registered in contravention of caveat — Whether caveat validly registered — Whether transfer void or voidable — Whether third party's title indefeasible — National Land Code 1965*

Land Law *— Indefeasibility of title and interests — Transfer of land duly registered in violation of caveat — Whether purchaser's title indefeasible — National Land Code 1965*

Civil Procedure *— Consent order — Setting aside, application for — Residuary beneficiary of intestate estate assigned her share of interests for consideration — Family settlement agreement made by all beneficiaries — Consent order granted by court — Assignee not made a party — Order made in ignorance of assignee's interest — Land sold to third party pursuant to agreement — Administration action against administrators — Whether could set aside consent order*

Civil Procedure *— Consent order — Setting aside, application for — Grounds for setting aside — Whether a fresh action must be filed for that purpose*

Succession *— Residuary beneficiary — Rights — Whether had right to assign beneficial interest pending administration of estate*

In 1943, one Mr Yap Cheng ('the deceased') died intestate leaving an estate which comprised, inter alia, four pieces of land. He was survived by his two widows and their issues, all having beneficial interests in the estate. Upon the death of one of the widows who was appointed administratrix of the estate ('the assignor's mother'), one of the issues ('the assignor/the fifth respondent') was appointed administratrix de bonis non. The assignor was entitled to shares in the estates of both the deceased and the assignor's mother. Pursuant to the terms of two agreements made in 1964 and 1965 ('the agreements'), the assignor assigned all her beneficial interests in the estates to the appellant. The appellant then lodged, as purchaser and assignee, a caveat against the four pieces of land. In 1973, upon the failure of the assignor and her co-administrator to administer and distribute the property, an administration action was commenced

against them by several beneficiaries under the estate. In reply, and in stating their willingness to distribute the assets, both administrators exhibited a family settlement agreement ('the settlement agreement'). The existence and interest of the appellant was neither mentioned in the settlement nor revealed in the administration action. A consent order was subsequently granted in terms of the provision of the settlement agreement. The assignor later offered to settle, by refund of money and pecuniary compensation, with the appellant. The appellant rejected the offer and refused to withdraw his caveat. The assignor and her co-administrator then attempted to remove it, but they failed. Pursuant to the consent order, one of the four pieces of land ('the fourth piece of land') was sold to the ninth respondent. The transfer was registered while the caveat endorsement remained uncancelled on the register. The appellant commenced action for a declaration that the consent order and the settlement agreement were void and for various reliefs including a claim to his rightful share to the proceeds of sale obtained from the sale of the fourth piece of land. The trial judge dismissed the action on the grounds: (i) that the assignment was void because it was non-absolute or conditional and that, accordingly, s 4(3) of the Civil Law Act 1956 was not complied with; (ii) that the appellant had no cause of action against the respondents as the administration of the residuary estate was not completed at the time of the assignment and the assignor was only a residuary beneficiary who had no interest in any of the assets of the estate. It was also held that the appellant had thus invalidly registered the caveat. The appellant appealed.

Held, allowing the appeal:

(1) On a true construction of the agreements, the beneficial interests of the assignor in the estates of both the deceased and the assignor's mother were transferred unconditionally to the assignee. The assignment was absolute and not conditional. Since it was absolute and also in writing and notice of the assignment had been given to the debtors, s 4(3) of the Act had been complied with. In any event, compliance with s 4(3) was not a prerequisite to the validity of the assignment, as the assignment would still be valid under equity (see pp 774H and 775E–F).

(2) The appellant had a cause of action in filing the action. At the time the action was filed, it could be said that the administration of the estate was complete with the estate having been distributed in accordance with the settlement agreement. The appellant was in the position to claim a share of part of the residue, ie the proceeds of sale and the land to be specifically given to residuary beneficiaries in satisfaction of claims of residuary beneficial shares. At the time of filing, the nett residue had already been ascertained as comprising the three pieces of land to be given to those

beneficiaries in satisfaction and the proceeds of sale to be received from the ninth respondent for the sale of the fourth piece of land (see pp 777I and 778A–C).

(3) The question of the validity or voidness of a caveat could only be decided in proceedings instituted for that purpose in accordance with the procedure laid down for its removal or continuance by the National Land Code 1965. A transaction duly registered in violation of a caveat was without the protection of indefeasibility of title that would have been normally acquired; such a transfer was not wholly void ab initio by virtue of the violation but voidable in proceedings instituted for that purpose. Therefore the status quo before the presentation of the transfer in violation of the caveat should be restored on the mere fact of such violation on a motion to court without the necessity to explore the underlying transaction between the parties (see pp 780F and 781A–E); *Woon Kim Poh v Sa'amah bt Haji Kasim* [1987] 1 MLJ 400 and *Rose Hall Ltd v Reeves* [1975] AC 411 followed.

(4) A perfected consent order can only be set aside in a fresh action filed for the purpose, and it can be set aside on the same grounds as those on which an agreement may be set aside (see pp 782G and 783D) *Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd* [1895] 2 Ch 273 followed.

(5) Although the appellant was not a party to the originating summons in which the consent order was made, he had locus standi to claim the relief of setting aside the consent order. The settlement agreement, which formed the basis of the consent order, was not binding on the appellant because he was not a party to it and it purported to dispose of his interest without his knowledge and consent. Thus, grave injustice had been caused to the appellant. Accordingly, the settlement agreement and the consent order, save in regard to that part of the order which granted leave to sell the fourth piece of land, should be set aside (see pp 783B, E and 784 A–B); *Huddersfield Banking Co v Lister* [1895] Ch 278 and *Marsden v Marsden* [1972] 2 All ER 1162 followed.

(6) That part of the order which granted leave to sell the fourth piece of land should be retained so that the ninth respondent who was entitled to and did accept the terms of the consent order, which was a command from a court of competent jurisdiction, would not be prejudiced. This retention was also justified on authority and in principle, bearing in mind that it was the exclusive right of an administrator to decide to sell or not to sell any land in the course of his duty of administration of the estate of the deceased person in question and to apply for leave of court to do so without any necessity to obtain any agreement from any residuary beneficiary of the estate, including the assignee of the interests of a residuary beneficiary (see p 784C–G).

[Bahasa Malaysia summary

Dalam tahun 1943, seorang yang bernama Encik Yap Cheng ('si mati') telah meninggal tak berwasiat, meninggalkan suatu estet yang terdiri daripada, antara lain, empat bidang tanah. Dia meninggalkan dua balu dan zuriat mereka, dan kesemua mereka mempunyai kepentingan benefisial dalam estet itu. Apabila seorang daripada dua orang balu tersebut yang telah dilantik sebagai pentadbir estet itu meninggal dunia (ibu penyerahhak'), salah seorang daripada zuriat ('penyerahhak tersebut/penentang kelima') telah dilantik sebagai pentadbir de bonis non. Penyerahhak tersebut berhak ke atas syer dalam estet kedua-dua si mati dan ibunya yang telah meninggal. Menurut terma dua perjanjian yang telah dibuat dalam tahun 1964 dan tahun 1965 ('perjanjian-perjanjian tersebut'), penyerahhak tersebut telah menyerahhak kesemua kepentingan benefisialnya dalam estet-estet itu kepada perayu. Perayu kemudiannya mengemukakan, sebagai pembeli dan pemegang serahhak, suatu kaveat terhadap empat bidang tanah itu. Dalam tahun 1973, apabila penyerahhak dan pentadbir bersama gagal mentadbir dan membahagi harta, suatu tindakan pentadbiran telah dimulakan terhadap mereka oleh beberapa benefisiari di bawah estet itu. Sebagai balasan, dan dalam menyatakan kerelaan mereka untuk membahagi aset-aset, kedua-dua pentadbir telah mengemukakan satu perjanjian penyelesaian keluarga ('perjanjian penyelesaian tersebut'). Kewujudan dan kepentingan perayu tidak disebut dalam penyelesaian dan tidak juga didedahkan dalam tindakan pentadbiran. Selepas itu, suatu perintah persetujuan seperti dikehendaki telah diberikan menurut peruntukan perjanjian penyelesaian tersebut. Penyerahhak tersebut kemudiannya telah membuat tawaran untuk membuat penyelesaian dengan perayu melalui bayaran balik wang dan pampasan kewangan. Perayu telah menolak tawaran itu dan enggan menarik balik kaveatnya. Penyerahhak tersebut dan pentadbir bersama kemudiannya telah cuba membatalkan kaveat, tetapi mereka tidak berjaya. Menurut perintah persetujuan, satu daripada empat bidang tanah ('bidang tanah keempat') telah dijual kepada penentang kesembilan. Pindahmilik itu telah didaftarkan walaupun pengendorsan kaveat tetap tidak dibatalkan atas daftar. Perayu memulakan tindakan untuk suatu deklarasi bahawa perintah persetujuan dan perjanjian penyelesaian tersebut adalah terbatal, dan memohon untuk berbagai relief termasuk suatu tuntutan hak ke atas hasil jualan yang telah diperolehi daripada jualan bidang tanah keempat. Hakim perbicaraan telah menolak tindakan itu atas alasan: (i) penyerahhakan adalah terbatal kerana ianya tidak mutlak atau bersyarat dan bahawa, oleh sebab itu, s 4(3) Akta Undang-Undang Sivil 1956 ('Akta tersebut') telah tidak dipatuhi; dan (ii) bahawa perayu tidak mempunyai kausa tindakan terhadap penentang-penentang kerana pentadbiran estet bakian tidak sempurna pada masa penyerahan hak dan penyerahhak tersebut hanya merupakan seorang benefisiari bakian yang tidak mempunyai kepentingan dalam sebarang aset estet itu. Adalah juga

A diputuskan bahawa dengan demikian perayu telah mendaftarkan kaveat secara tak sah. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Atas suatu pentafsiran yang betul terhadap perjanjian-perjanjian B tersebut, kepentingan benefisial penyerahhak tersebut dalam estet kedua-dua si mati dan ibunya telah dipindahmilik tanpa syarat kepada pemegang serahhak. Penyerahhakan adalah mutlak dan tidak bersyarat. Oleh kerana ianya mutlak dan juga bertulis dan notis penyerahan hak telah diberikan kepada penghutang-C penghutang, s 4(3) Akta tersebut telah dipatuhi. Bagaimanapun, pematuhan s 4(3) bukan merupakan suatu prasyarat kepada kesahan penyerahan hak, kerana penyerahan hak itu masih sah di bawah ekuiti (lihat ms 774H dan 775E–F).

(2) Perayu mempunyai kausa tindakan dalam pemfailan tindakan itu. Pada masa tindakan difailkan, ia bolehlah dikatakan bahawa D pentadbiran estet itu adalah sempurna kerana estet itu telah dibahagikan menurut perjanjian penyelesaian tersebut. Perayu berada dalam keadaan untuk menuntut sebahagian daripada bakian, iaitu hasil jualan dan tanah yang akan diberikan khusus kepada benefisiari bakian bagi memuaskan syer benefisial bakian. Pada masa pemfailan, baki bersih telah pun ditentukan sebagai E terdiri daripada tiga bidang tanah untuk diberi kepada benefisiari-benefisiari tersebut sebagai penyelesaian dan hasil jualan harus diterima daripada penentang kesembilan bagi jualan bidang tanah keempat (lihat ms 777I dan 778A–C).

(3) Persoalan kesahan atau pembatalan sesuatu kaveat hanya boleh F ditentukan dalam prosiding yang dimulakan untuk tujuan itu menurut prosedur yang dibuat oleh Kanun Tanah Negara 1965 untuk pembatalannya atau perlanjutannya. Suatu transaksi yang didaftarkan dan melanggar suatu kaveat adalah tidak dilindungi oleh ketakbolehan disangkal hakmilik yang akan diperolehi G biasanya; pindahmilik sedemikian tidaklah pada keseluruhannya tak sah ab initio akibat pelanggaran itu tetapi 'boleh batal' dalam prosiding yang dimulakan untuk tujuan itu. Maka, status quo sebelum pengemukaan pindahmilik yang melanggar kaveat haruslah dikembalikan semata-mata atas fakta pelanggaran sebegitu dalam suatu usul ke mahkamah tanpa keperluan untuk H memeriksa dengan teliti dasar transaksi antara pihak-pihak yang berkenaan (lihat ms 780F dan 781A–E); *Woon Kim Poh v Sa'amah bt Haji Kasim* [1987] 1 MLJ 400 dan *Rose Hall Ltd v Reeves* [1975] AC 411 diikut.

(4) Satu perintah persetujuan yang telah didaftarkan dengan I sempurna hanya boleh diketepikan dalam tindakan baru yang difailkan untuk tujuan itu, dan ianya boleh diketepikan atas alasan yang sama seperti suatu perjanjian (lihat ms 782G dan 783D); *Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd* [1895] 2 Ch 273 diikut.

(5) Walaupun perayu bukan suatu pihak kepada saman pemula dalam mana perintah persetujuan telah dibuat, dia mempunyai locus standi untuk menuntut relief bagi mengetepikan perintah persetujuan. Perjanjian penyelesaian tersebut, yang membentuk asas perintah persetujuan, tidak mengikat pada perayu sebab dia bukan suatu pihak kepadanya dan ia bertujuan untuk menghapuskan kepentingannya tanpa pengetahuan dan kebenarannya. Justeru itu, ketidakadilan serius telah diakibatkan kepada perayu. Ekoran itu, perjanjian penyelesaian tersebut dan perintah persetujuan, melainkan bahagian perintah itu yang memberikan kebenaran untuk menjual tanah keempat, haruslah diketepikan (lihat ms 783B, E dan 784 A–B); *Huddersfield Banking Co v Lister* [1895] Ch 278 dan *Marsden v Marsden* [1972] 2 All ER 1162 diikut.

(6) Bahagian perintah itu yang memberikan kebenaran untuk menjual bidang tanah keempat haruslah dikekalkan supaya tidak memudaratkan penentang kesembilan yang berhak kepada dan telah pun menerima terma perintah persetujuan, yang adalah suatu perintah dari mahkamah yang mempunyai bidang kuasa kompeten. Pengekalan ini juga adalah berjustifikasi atas autoriti dan prinsip, dengan mengingat bahawa adalah merupakan hak eksklusif seseorang pentadbir untuk memutuskan sama ada atau tidak untuk menjual mana-mana tanah semasa menjalankan kewajipan pentadbiran estet si mati yang berkenaan dan untuk memohon kebenaran mahkamah untuk berbuat demikian tanpa sebarang keperluan untuk memperolehi persetujuan daripada mana-mana benefisiari bakian estet itu, termasuk pemegang serahhak kepentingan seseorang benefisiari bakian (lihat ms 784C–G).]

Notes

For cases on assignment, see 1 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2189–2194.

For cases on the application to set aside a consent order, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 781–784.

For a case on caveat and transfer registered in contravention of caveat, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2383.

For cases on indefeasibilty of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1837–1896.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47 PC

Dr Barnado's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts [1921] 2 AC 1

Cargill v Bower (1879) 10 Ch D 502

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37
Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd [1895] 2 Ch 278
Law Hap Lien v Henry Lo Siak Jin & Anor [1983] 1 MLJ 381
Lee Ah Thaw v Lee Chun Tek [1978] 1 MLJ 173
Lord Sudeley & Ors v AG [1897] AC 11
Marsden v Marsden [1972] 2 All ER 1162
Rose Hall Ltd v Reeves [1975] AC 411
Woon Kim Poh v Sa'amah bt Haji Kasim [1987] 1 MLJ 400

Legislation referred to

Civil Law Act 1956 s 4(3)
Distribution Act 1958
National Land Code 1965 ss 314, 340, 432
Probate and Administration Act 1956 s 60
Law of Property Act 1925 s 136 [UK]
Registration of Titles Law [Jamaica]

Appeal from: Civil Suit No 309–1979 (High Court, Kuala Lumpur)

Wong Chong Wah (*Ambiga Sreenevasan* with him) (*Skrine & Co*) for the appellant.
Wong Chok Meng (*Shereena Hassan* with him) (*Ng Kok Thoy & Co*) for the first to eighth and tehth respondents.
Cyrus Das (*Romesh Abraham* with him) (*Shook Lin & Bok*) for the ninth respondent.

Peh Swee Chin FCJ (delivering the judgment of the court): This appeal focuses on the validity of some assignment of some beneficial interests in an intestate's estate, the viability of a caveat the assignee lodged against the immovable assets of the estate and the effect of a court's order that deals with such assets without reference to the purported assignment.

It will be necessary to set out briefly the rather long and complicated facts of this case.

The plaintiff/appellant claims that by virtue of two agreements read together constituting an assignment, made by one Yap Ah Looi (f), ('the assignor') and the plaintiff/appellant ('the assignee'), the assignor sold, transferred, assigned to the assignee all her interests, rights, benefits and claims respectively in the estates of her father, Yap Cheng deceased ('the deceased father'), and her mother, Ng Cheng Kim deceased (the deceased mother), for the price of RM15,000. The agreements dated 1 April 1964 and 20 January 1965 are set out in full below:

> THIS DEED OF ASSIGNMENT is made this 1st day of April 1964 Between YAP AH LOOI @ YAP AH LAY of 60D off Campbell Road, Kuala Lumpur (hereinafter called the Assignor) of the one part, and KHAW POH CHHUAN of Kuala Lumpur (hereinafter called the Assignee) of the other part.

WHEREAS the Assignor is one of the co-administrators of the estate of Yap Cheng @ Yap Ching (deceased). A

AND WHEREAS the said Yap Cheng (deceased) died intestate on the 20th day of December 1943, in the Federation of Malaya leaving surviving him the following persons:

(1) Ng Cheng Kim (f) widow since deceased. B

(2) Ong Keow (f) widow since deceased.

(3) Yap Ah Looi (the Assignor)

(4) Yap Vui Kor

(5) Yap Ban Ler C

(6) Yap Ban Lee

(7) Yap Ban Chuan

(8) Yap Hong Chu

(9) Yap Chin Toh D

AND WHEREAS the estate of Yap Cheng (deceased) consists of among other things movable and immovable properties and several investments specified in the schedule annexed hereto (hereinafter called the said property).

AND WHEREAS the Assignor is entitled to a share in the said property under the estate of Yap Cheng (deceased) and a share under the estate of Ng Cheng Kim (deceased) in the said property. E

AND WHEREAS the Assignor shall as soon as possible apply to the High Court, Kuala Lumpur to wind up the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) and to distribute the said property to the abovementioned persons entitled to the said property including the Assignee.

AND WHEREAS pending the winding up and distribution of the said property the Assignor hereby agrees to assign sell and transfer all her rights, interests, benefits and claims of whatever nature legal or equitable in respect of her share in the said property under the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) to the Assignee free from all encumbrances for the sum of RM15,000. F

G

NOW THIS DEED WITNESSETH as follows:

1 In consideration of the sum of RM6,000 (Ringgit Malaysia six thousand only) now paid by the Assignee to the Assignor (the receipt of which sum the Assignor hereby acknowledges) the Assignor hereby sells, transfers and assigns all her interests, rights, benefits and claims whether legal or equitable in the estates of Yap Cheng (deceased) and Ng Cheng Kim (f) (deceased) to the Assignee absolutely free from all encumbrances at the price RM15,000 (Ringgit Malaysia fifteen thousand only). H

2 The balance sum of RM9,000 shall be paid by the Assignee to the Assignor on or before 31 March 1965.

3 The Assignor undertakes to take all reasonable steps and actions to apply for Letters of Administration to the estate of Ng Cheng Kim (f) (deceased) and to wind up the affairs of the estates of Yap Cheng (deceased) and Ng Cheng Kim (f) (deceased) and to distribute the assets to the above beneficiaries excluding the Assignor but including the Assignee. I

4 The Assignor undertakes to authorize any persons including the Court and the administrators to make payment in respect of her share under the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) to the Assignee absolutely. Such authority shall be deemed to be irrevocable.

5 The Assignor agrees irrevocably to lend her name to the Assignee for taking whatever necessary steps and actions under the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) against any persons for accounts collecting assets, winding up the said estates and distributing the said property.

6 The Assignor shall not take steps or actions which will be prejudicial to the interests and rights of the Assignee. Prior to taking any step and action the Assignee agrees that he must first get the prior written consent of the Assignee for doing so.

7 The Assignor shall sign or affirm all documents, plans, applications, cheques and papers at the request and cost of the Assignee in order to effectuate the terms and objects of this Agreement.

8 Upon receipt of any documents, notices, cheques and other payments in respect of the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) the Assignor shall immediately hand over the same to the Assignee.

9 This Assignment shall be binding upon the parties hereto, their respective heirs, administrators, executors, and the assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands this day and year first above written.

SIGNED by the ASSIGNOR)
in the presence of:) —Sgd—

Witness: —Sgd—

SIGNED by the ASSIGNOR)
in the presence of:) —Sgd—

Witness: —Sgd—

THE SCHEDULE ABOVE REFERRED TO:

(1) EMR No 5614 Lot 4185

(2) EMR No 4859 Lot 1035

(3) EMR No 6048 Lot 3571

(4) EMR No 4140 Lot 3572
all in the Mukim of Batu in the District of Kuala Lumpur

(5) Shares and stocks in the undertaking of Lian Seng Bus Co Ltd and profits and dividends

(6) Debts due to the estate of Yap Cheng (deceased)

—Sgd—

—Sgd—

AGREEMENT

THIS AGREEMENT is made this 20th day of January, 1965 BETWEEN YAP AH LOOI @ YAP AH LAY (f) of No 60D, off Campbell Road, Kuala Lumpur (hereinafter called the Assignor) of the one part AND KHAW POH CHHUAN of Kuala Lumpur (hereinafter called the Assignee) of the other part SUPPLEMENTAL to an Agreement dated the 1st day of April, 1964 made between the same parties in the same order (hereinafter called 'the Principal Agreement').

WHEREAS under the Principal Agreement the Assignor has agreed to assign sell and transfer all her rights, interests benefits and claims of whatever nature legal or equitable in respect of her share in the immovable and movable properties specified in the Schedule annexed to the Principal Agreement under the estates of Yap Cheng deceased and Ng Cheng Kim (f) deceased to the Assignee free from all encumbrances for the sum of Ringgit Malaysia Fifteen Thousand (RM15,000) only.

AND WHEREAS the Assignor has failed to take all reasonable steps and actions to apply for the Letters of Administration to the estate of Ng Cheng Kim (f) deceased and to wind up the affairs of the estates of Yap Cheng deceased and Ng Cheng Kim (f) deceased and to distribute the assets therein as stipulated under the Principal Agreement, thereby causing unreasonable delay.

AND WHEREAS the Parties, hereto have now further agreed as follows:

1 That the Assignor shall from the date hereof take active steps and act diligently to proceed in the application for administration of the estate of Ng Cheng Kim (f) deceased and to wind up the affairs of the estate of Yap Cheng deceased and to distribute the assets and execute a valid and registrable transfer of her share in the immovable property in favour of the Assignee or his nominee free from encumbrances.

2 That the Assignee shall upon execution of this agreement pay a further sum of Ringgit Malaysia Seven Hundred and Fifty (RM750) only to the Assignor. The balance sum of Ringgit Malaysia eight thousand two hundred and fifty (RM8,250) only shall be paid by the Assignee to the Assignor within two weeks from the receipt of a written notice that the orders for distribution of the estates of Yap Cheng deceased and Ng Cheng Kim (f) deceased are obtained and that the Assignor is in a position to execute a valid and registrable transfer of the Assignor's share in the immovable properties of the said deceased's estates and against the delivery of the same and the relevant titles.

3 It is hereby mutually agreed that clause 2 of the Principle Agreement is hereby revoked and deleted.

4 This Agreement shall be binding upon the parties hereto, their respective heirs, administrators executors and the assigns of the Assignees.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

SIGNED by the said Assignor)
in the presence of:) —Sgd—

SIGNED by the said Assignee)

A in the presence of:) —Sgd—

It will be noticed that the first of the two agreements was the purported assignment, and the second agreement, a supplementary agreement to the first agreement on the matter of a variation of the time of payment of the balance of purchase price.

B The original administratrix of the estate of the deceased father was the deceased mother who died subsequently without completing the administration. Letters of administration de bonis non were granted subsequently in 1960 to the assignor and her co-administrator, one Yap Ooi Koh (the tenth defendant), a son of the deceased father (the co-
C administrator), and we may just as well add that the co-administrator was notified by the assignor of the purported assignment in question to the assignee.

At the time the aforesaid assignment agreement which was dated 1 April 1964 was made, the assets of the deceased father comprised principally four pieces of land. The estate of the deceased mother consisted of a
D beneficial share in the estate of the deceased father as determined by the Distribution Act 1958, the deceased mother having been one of the two widows of the deceased father, the other widow, one Ong Keow, had also died by the time of the assignment agreement dated 1 April 1964 was made leaving her own three children who were parties to this appeal. The assignor
E herself had died in 1988.

At the date of judgment of the High Court below and before us, the first defendants have been and still are the administrators of the assignor; the second and third defendants, the children of the deceased father by Ong Keow, the other wife of the deceased father; the fourth defendants, the
F administrators of yet another son, since deceased, of Ong Keow (f); the fifth defendants, the administrators of the deceased father; the sixth, seventh, eighth and tenth defendants, the children of the deceased mother, and the ninth defendant, Tan Chong & Sons Motor Co Sdn Bhd, a purchaser of one of the four pieces of land of the estate of the deceased father (Tan Chong).

G In 1965, the assignor filed Originating Summons No 186/1965, asking for an order to distribute all the property of the deceased father. In the proceedings, she admitted that she had assigned all her beneficial interests in the estates of the deceased father and the deceased mother to the assignee. As found by the learned trial judge, she was not keen to pursue the
H matter after filing the said originating summons which lay dormant for five years. It was withdrawn by her solicitors in 1970 on her indication to commence fresh proceedings which were not filed. In this connection, we might just as well add, that having regard to the common course of human conduct, the originating summons must have been a matter of some great interest to all the other beneficiaries of the estates of the deceased father,
I deceased mother, or the other widow of the deceased father who must all have been aware of the assignment of the beneficial share of the assignor to the assignee as set out in the originating summons or the assignor's affidavit in support of it.

The assignee took up residence in Australia and appointed four persons as his attorneys to act jointly or severally by a duly registered power of attorney, and one of such attorneys called Cheng Hong Jiun (the attorney) lodged a caveat against the four pieces of land of the estate of the deceased father as purchaser and assignee of the assignor's interests, rights, etc in the estates of the deceased father and deceased mother.

On 11 June 1973, the children of the other wife of the deceased father, being the second, third and fourth defendants, filed what appears to be an administration action by Originating Summons No 209/73 in the High Court, Kuala Lumpur against the assignor and her co-administrator of the deceased father's estate and three children of the deceased mother, being sixth, seventh and eighth defendants as respondents, claiming accounts, distribution of assets as provided by the law of intestacy of the estate of the deceased father etc. In reply, the assignor and her co-administrator stated their willingness to distribute assets according to the Distribution Act 1958, the proceeds of sale of the remaining assets of the deceased father etc. It is significant that the name or connection of the assignee to the estate of the deceased father this time round were not mentioned by the assignor and the co-administrator. They further and later exhibited a family settlement agreement of all the beneficiaries or children of the deceased father, and such agreement does not contain any mention of the assignee.

The family settlement agreement provided for the sale of three pieces of land of the deceased father, viz EMR 4859, EMR 6048 and EMR 4140 to be sold in equal shares, to the sixth, seventh, eighth and tenth defendants, four of the children of the deceased father at the price of RM2 per square foot but the price payable would be treated as having been paid by them by adjusting the value of their distributive shares in accordance with the Distribution Act 1958 to be dealt with further as follows.

One of the four pieces of land would be sold to Tan Chong at the price of RM6.50 per square foot and the proceeds of sale would be distributed according to the Distribution Act 1958 to the children of the deceased father, and in so far as the shares (to such proceeds) of the sixth, seventh, eighth and tenth defendants, ie the would-be transferees of the other three pieces of land, the shares of such proceeds payable to them were to be adjusted with the price or the value of the three other pieces of land on the basis of RM2 per square foot as stated above.

The plaintiffs in the administration action, ie Originating Summons No 209/1973 confirmed the family agreement and asked for a consent order in terms of the family settlement agreement which had totally brushed aside any interests of the assignee. A consent order thus was made on 24 December 1973 by the court without any awareness of the interests of the assignee.

The assignor thereafter sought to settle the matter with the assignee by agreeing to refund the sum of RM6,750 received by her so far and to pay further damages in the sum of RM30,000. The settlement was aborted on the assignor's failure to agree on one outstanding term, ie that the total sum

A of RM36,750 was to be paid first to the assignee's solicitors as stakeholders *before* the assignee withdrew his caveat against the four pieces of land; a consequence of mistrust between each other.

Battle lines thereafter continued to be drawn between the assignee and the assignor. The assignor and her co-administrator applied to the Registrar B of Titles, Federal Territory for the removal of the assignee's caveat with the address of the assignee stated as: 'c/o 84, Kg Jamil Rais, Sungai Way, Kuala Lumpur' by Form 19C of the National Land Code, and the form was sent to the land administrator, Petaling Jaya for service. It was not served on the assignee by the land office at Petaling Jaya on the ground of no name of road or street being given. The form was issued again for the publication in C the gazette by way of substituted service under s 432 of the National Land Code 1965 (theCode) with copies to be posted at the lands etc. There was no record of posting on the land and that the fact of purported removal of the caveat was also not endorsed on the register documents of title of the four pieces of land.

D Pursuant to the consent order made on the Originating Summons No 209/1973, which also granted leave to sell one of the four pieces of land, ie EMR 5614 (which was not among those to be transferred to certain children of the deceased father), the assignor and her co-administrator entered into an agreement to sell EMR 5614 to Tan Chong, at the price of E the RM6.50 per square foot totalling to RM990,990 which was reduced to RM900,000 for the benefit of Tan Chong as a result of the take-over by the Dewan Bandaraya Kuala Lumpur of part of the land under EMR 5614 to the detriment of Tan Chong.

The transfer in favour of Tan Chong in respect of EMR 5614 was duly registered on 23 December 1977 while the caveat endorsement remained F on the register uncancelled as stated above.

The assignee came to know about this and through his solicitors wrote and protested to the relevant land administrator, the assignor and Tan Chong, asking for the transfer to Tan Chong to be cancelled.

G Not getting the desired response from the parties he had written to, the assignee filed the present action concerned in this appeal, claiming various declarations, eg that the consent order and the family settlement agreement were invalid; that he was entitled to 81/630 undivided share in each of the four pieces of land etc; and in effect for all necessary consequential orders and directions for the assignee to be so registered as such a part owner of H the land etc.

The action was described by the learned trial judge in a long and apparently careful judgment which has been severely criticized before us on appeal.

From the memorandum of the appeal, it is crystal clear, that the I assignment by the assignor to the assignee in respect of the assignor's rights and interests in the estates of both the deceased father and the deceased mother is the most important issue. The assignment was held by the

learned trial judge to be void and invalid for various reasons which will be presently looked into, and in doing so, it is necessary to set out s 4(3) of the Civil Law Act 1956 on which the learned judge seems to have relied to an unjustified extent. The said s 4(3) reads:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

The first reason of the learned trial judge for holding the assignment in question to be invalid is that the assignment was said to be non-absolute or conditional. According to the learned judge, the assignment would take effect after the assignor had applied for letters of administration of the deceased mother's estate; that the share of the assignee could not be paid to the assignee unless the assignor authorized it; that the assignee could not take any action by using the name of the assignor; that the assignor could not give valid discharge to the administrators of the estates of the deceased father and deceased mother and that the balance sum of the price payable by the assignor to the assignee would be paid only after the necessary orders for distribution of the two estates were obtained.

We do not agree.

Looking at the two agreements dated 1 April 1964 and 20 January 1965 respectively, the fact that the latter agreement is supplementary to the earlier agreement has never been in dispute among the parties. To determine if the assignment is conditional or absolute, the test of an absolute assignment should normally be only that it is one by which the entire interest of the assignor in the chose in action (such as the interest as claimed by the assignee herein) is, for the time being, transferred unconditionally to the assignee and placed completely under the assignee's control. Therefore, on a true construction of the agreements, the question is this, was the beneficial interest of the assignor in the estates of both the deceased father and the deceased mother transferred unconditionally to the assignee? If the answer is affirmative, the assignment is absolute.

By far, the most important clause is cl 1 of the agreement dated 1 April 1964, set out above earlier. Clause 1 states that on the payment of RM6,000 to account of the price of RM15,000 the assignor sells, transfers and assigns all her interests, rights etc to the assignee absolutely and free from all encumbrances. A fair reading of cl 1, and nothing more, will lead to the inevitable conclusion that such interests and rights etc pass absolutely under this clause and such passing of such interests etc are not dependent

A on other terms of this agreement or for that matter, both agreements have no term of any kind that really makes such passing of such interests etc conditional as will be seen.

The rest of the terms of both agreements must then be looked into. None of such terms could function as a condition precedent, of the type B one met in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 (PC) in which the purchase of the land was conditional or contingent on the obtaining of 'renewal' of the leases, ie the purchase agreement was a contingent contract. Neither any of such terms functions as a condition subsequent, eg that the assignment is to terminate upon the occurrence of some event. None of such other terms will, in any other way, amount to a C fundamental stipulation, ie a condition for the purchase of the beneficial interest, the breach of which would entitle an innocent party to treat the contract for the purchase as at an end. These other terms, (ie terms other than cl 1) may, in our view, either amount to terms of the type the breach of any of which entitles one to a mere claim for damages only or they may D equally amount, by their nature, to words of expectation which do not form any actual part of the contract of the said purchase. For the purpose of this case, it is not necessary to decide as to which category of the two such other terms will amount to.

We are therefore of the view that the assignment is absolute and not conditional.

E

Since it is absolute and is also in writing and notice of the assignment had undoubtedly been given to the debtors, ie the administrators of the estate of the deceased father, viz the assignor in her other capacity as one of the administrators and her co-administrator, s 4(3) of the Civil Law Act 1956 has been complied with contrary to the ruling of the learned judge. In F any event, compliance with s 4(3) is not a pre-requisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s 4(3), eg even without notice of the assignment to such debtors, for the sake of argument, the assignment would have been valid in equity in any event against the assignor.

G The learned judge appears to be in error in suggesting as if there were two different distinct kinds of assignment, ie one in equity and one under s 4(3) of the Civil Law Act 1956, both assignments being mutually exclusive. Nothing is further from the truth. If an assignment is valid in law or legal (ie legally binding on the assignor), then it is valid or legal and compliance with s 4(3) is not essential to make it valid or legal as stated. Section 4(3) H has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant. It is instructive to read the observation and conclusion of Prof Furmston in I Cheshire, Fifoot & Furmston, *Law of Contract* (1987, 11th Ed) at p 498 in regard to s 136 of England's Law of Property Act 1925 which is in pari material with our s 4(3): 'The statute has not altered the law in substance.

It is merely machinery. It does not confer a right of action which did not exist before but enables the right of action that has always existed to be pursued in a less roundabout fashion.' A

The learned judge appears again to have held also that the assignment was void because both the agreements giving rise to the assignment were themselves void in turn because the agreements were said by the learned judge to create an uncertainty. It was not at all certain that the assignor would be the one acceptable to the other beneficiaries for applying for letters of administration to the estate of the deceased mother. We are unable to agree, please see our reasoning earlier, especially about terms which may appear to be words of expectation or terms which are not fundamental stipulations etc. B C

Both the agreements were said again to be void also for being uncertain by virtue of s 60 of the Probate and Administration Act 1956, in that the assignor did not join, in the assignment agreement, the deceased father's estate which was represented by two administrators, viz the assignor (when she wore the other hat) and her co-administrator. Further, the assignor would have to apply for leave to sell the interest in the four pieces of land to the assignee and whether such leave would be granted or not would be also uncertain. The learned judge apparently accepted learned counsel's submission in coming to this conclusion which cannot be upheld for the same reasoning of ours earlier as referred to also in the preceding paragraph. D E

Quite apart from our view as to the passing of interest by virtue of cl 1 of the agreement of 1964 aforesaid, and as to the nature of the rest of the clauses, the subject matter of the assignment is a chose in action and not the lands as such, therefore the agreements in question cannot be treated in law as agreements to buy and sell land or parts of such land; more about this later in connection with the ruling of the learned judge that the assignee had no cause of action against the defendants, when we will discuss about a residuary beneficiary having no interest, legal or equitable, in the land or assets of a residuary estate. F

We therefore hold that the assignment is valid or rather the assignment is not invalid by reason of uncertainties mentioned by the learned judge. G

The next conclusion of the learned judge appears to be, if we summarize correctly, that the assignee had no cause of action against the respondents in this appeal.

The lack of a cause of action was said to be due to the fact that the assignor was in no position, as on 1 April 1964 when the assignment was made, to assign any part of the assets of the estate of the deceased father to the assignee, because, the assignor as a 'residuary legatee' had no interest, legal or equitable, in the assets of the residuary estate which she could dispose of. Strictly speaking and in passing, no will was made by the deceased father and as a legacy is usually given by a will, we think that the 'residuary legatee' spoken of was meant to mean a residuary beneficiary. H I

The assignee only has what the assignor had. Therefore the assignee is indeed, in effect, a residuary beneficiary of the estates of both the deceased

A father and the deceased mother, he having stepped into the shoes of the assignor. The observation of the learned judge is therefore quite right to the effect that the assignee, as a residuary beneficiary, has only a right to have the residuary estate of the deceased father properly administered, and applied for his benefit after the administration is completed, and such residuary beneficiary, until the administration is completed, has no interest, B legal or equitable in any of the assets of the estate of the intestate. When administration is complete or completed, the nett residue, which usually but not always, comprises cash, is the divisible among the residuary beneficiaries, if more than one. In other words, a beneficiary can claim immediately his share of such divisible residue at that stage.

C The position of a residuary beneficiary with regard to the assets of an intestate, as stated above, is indeed supported by rather impeccable authorities, viz *Lord Sudeley & Ors v AG* [1897] AC 11, *Dr Barnado's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* [1921] 2 AC 1, *Lee Ah Thaw & Anor v Lee Chun Tek* D [1978] 1 MLJ 173 and *Law Hap Lien v Henry Lo Siak Jin & Anor* [1983] 1 MLJ 381.

For explaining further the expression, 'until the estate is fully administered'; we think that it is fully administered after the administrator has satisfied all testamentary expenses and debts (and in the case of a E deceased person dying testate, in addition, all legacies and bequests etc), and before the satisfaction of expenses etc, the residuary beneficiary cannot yet point to any particular asset or land comprised in the estate and claim his share in it. Until the administration is completed, the administrator can, eg, select any particular asset for selling for paying debts and employ any other legitimate method of administration. The administrators can of course, F determine the form of residue that can be divided among the residuary beneficiaries when the administration is completed, such form of residue may consist of specific land.

For better understanding, the phrase 'the claim to have the property properly administered' means a residuary beneficiary can, after all persuasion G fails, file an administration action asking for accounts and for steps to bring the administration to its completion etc. The said consent order mentioned earlier was in fact made on such an administration action, ie Originating Summons No 209/1973 mentioned above which was filed by some of the children of the deceased father. Thus the assignee in the instant case could H have filed such an originating summons himself if he had wanted to do so. If he did, to say he had no cause of action would hold no water. But here, he filed the action for the court to declare the consent order and the family settlement agreement void and for various reliefs including his claim to his rightful share to the proceeds of sale paid by Tan Chong as an alternative prayer etc. Did he have a cause of action on filing the present action?

I We think he had. When the assignee filed the present action, the administration can be said to be completed with the estate being distributed, as done by the administrators of the deceased father, according to the

respondents, in accordance with the family settlement agreement subject to leave of court, purportedly signed by all beneficiaries or their personal representatives as the case may be, in the manner described earlier with a provision for one of the four pieces of land to be sold to the ninth respondent, Tan Chong. The proceeds of sale to Tan Chong would be distributed among the beneficiaries in the manner described. At the time of filing the action, he was in a position to claim a share of part of the residue, ie the proceeds of sale and the land to be specifically given to residuary beneficiaries in satisfaction of claims of residuary beneficial shares, and this was so even if he has claimed a lot more other reliefs, and at such time of filing, the nett residue had already been ascertained as comprising the three pieces of land to be given to those specific beneficiaries in satisfaction, and the proceeds of sale receivable from Tan Chong.

We next deal with the caveat lodged by the assignee and the conclusion of the learned judge that it was invalidly registered .

It will be remembered that the caveat remained, glaringly, on the register when the memorandum of transfer to Tan Chong was presented for registration. The transfer was registered, prima facie, in violation of the caveat.

What ought to be the position with regard to the registration of a transfer in violation of a caveat on the register as happened in this case?

First, the assignee's counsel submitted to the effect that there was no such thing as a void caveat in law and that the transfer in question was void because of the presence of the caveat.

The importance of the caveat in the Code is too well known to all. To refresh our memory, very briefly, Hashim Yeop A Sani SCJ (as he then was) in *Woon Kim Poh v Sa'amah bte Hj Kasim* [1987] 1 MLJ 400 at p 402 spoke thus:

> Coming back to our case, under s 322 of the National Land Code so long as a caveat is in force registration, endorsement or entry on the register document of title of any instrument of dealing shall be prohibited. The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212. A caveat freezes the register at least until the caveator has taken court action to determine his claim — Judith Sihombing, p 588. In the Torrens system where registration is the very basis of the system the prohibition in s 322(2) must be strictly complied with. In other words the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.

Thus the Federal Court in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 remarked, 'The root principle of the Torrens system is that the register should be a mirror of title and that a purchaser should not have to search beyond this title.'

A The question or submission that there is no such thing as a void caveat is at once difficult as it is intriguing. The only authority cited for the assignee is apparently an obiter dictum of Lord Wilberforce in an appeal from Jamaica in *Rose Hall Ltd v Reeves* [1975] AC 411 at p 420:

> B One final argument may be mentioned. The respondent had, as has been stated, registered a caveat on 11 December 1967, with the Registrar of Titles, Jamaica. This, of course, had the effect of preventing any dealings with the land while it remained effective. The appellant's contention was that this caveat was void, since at the date when it was lodged, the appellant had no interest to protect; consequently the rights of the parties should be dealt with as if it had never existed. Their Lordships cannot accept this. In the first place C the concept of a void caveat is novel and difficult to comprehend and was not explained by the appellant. A caveat is simply a fact — it may be justified in law or not — and whether it is either must be decided through the procedure laid down in the Registration of Title Law. Even if, which appears probable, it could have been removed, prior to 22 August 1968, or subsequently, it is was not so removed.

D Lord Wilberforce mentioned about the concept of a void caveat being a novel one and difficult to comprehend and stated the concept was not explained by the appellant who raised it in the judicial committee. We are in the same boat as Lord Wilberforce about the lack of any such explanation but his Lordship was in a slightly more comfortable position in that the E lodging of the caveat (including its subsidiary question of a void caveat) had no bearing on the central issue in the cited case due to the commencement of some intervening legislation. His Lordship, unfortunately for us, only had to say very briefly as quoted above.

To the argument there in the cited case that there were no interest to F protect and therefore the caveat in the quoted case should be treated as if it had never existed, his Lordship there could not accept this proposition. Whether it was justified in law or not must be decided through the procedure in (Jamaica's) Registration of Titles Law, and that even if it was probable it could be so removed, it was not removed. It would not be off the mark for us to say that the removal procedure spoken of, ie Jamaica's Registration G of Title Law, must be the corresponding procedure of removal in the Code.

The implication of the quoted passage above is indeed there is no such thing as a void caveat unless it is removed in accordance with the procedure provided both for its creation and removal in the Code. Let us discuss it briefly from various angles.

H It would indeed bring anarchy to the Torrens system of land registration if anybody, without applying to remove a caveat in accordance with the established procedure, could argue it is void whenever he sees it fit to raise it in any proceeding laterally, thus undermining a caveat's efficacy and a pillar of strength of the Torrens system.

I We have gone through a large number of cases, there could be, but we have found no cases where a caveat was allowed to be challenged as being

void without the invoking of procedure for its removal or its continuation involved at the same time in these cases. Thus this large number of cases would seem to give support to the requirement for its removal in accordance with the procedure laid down, before one could speak of the voidness of such a caveat, and the express provision of such procedure in the Code, in itself, is also eloquent testimony of such requirement.

One begins to realize at the same time on the other hand, the complete ease with which anyone can lodge a caveat, even with nothing in mind but a resolve to delay or even to annoy a would-be caveatee.

But Lord Diplock in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at 214 prefacing his comments in detail on the procedure for removal or continuing of caveat in accordance with the Code, seems to allude to the speediness of such procedure by saying:

> Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

The description of speediness is well-deserved if compared with the need to adjudicate on the issues of complexity, normally, of the underlying impugned transactions between the parties in litigation, a great part of which one can steer clear in applying for the removal of a caveat.

For the reasons given, we conclude that the question of any validity or voidness of any caveat can only be raised in proceedings in accordance with the procedure of the Code for its removal or continuance. In other words the validity of such caveat can only be challenged in the proceedings instituted for the purpose in accordance with the procedure laid down in the Code.

What then is the effect of a dealing registered by the registering authority in violation of the caveat on the register? The Federal Court case of *Woon Kim Poh v Sa'amah bt Haji Kasim* [1987] 1 MLJ 400 is directly relevant. In that case, a consent order of the court in question there mentioned the removal of three caveats, but the Registrar of Titles registered certain transfers of land in violation of another caveat not mentioned in the consent order. He had misread the order, so he claimed. The court held in that case that the new registered proprietor who emerged on the register in violation of the caveat could not rely on s 340 of the Code in regard to the indefensibility of title, and that any aggrieved person could appeal against such act, or omission of the Registrar within three months beginning with the date the decision was communicated to him. It was held that s 340 must be read with other sections of the Code; for that matter it goes without saying that the transfer in violation of the caveat can undoubtedly be challenged with a view to having the transfer set aside.

Despite the great importance of the caveat in the system, the ratio of *Woon Kim Poh* is that a transaction duly registered in violation of a caveat, is only without the protection of indefeasibility of title that would have been normally acquired; and be it noted that it carries with it a clear implication that such a transfer is not wholly void ab initio by virtue of the said violation but 'voidable' in proceedings instituted for the purpose.

In *Woon Kim Poh*'s case, the caveator applied by motion for setting aside certain transfer of some land registered by the Registrar of Titles in violation of the caveat still in force on the register. The caveator had lodged the caveat so that she could claim a transfer of the land in question to herself from the registered owner in accordance with some agreement between them. The registered owner transferred it to one Woon and the transfer was registered by the Registrar of Titles in violation of the caveat. On the motion against Woon by the caveator, the learned judge in the High Court set aside the transfer against Woon. The merits of Woon, if he had any, were not touched on by the learned judge except on the mere facts of the existence of a caveat and a transfer registered in violation of it. The decision of his Lordship was upheld by the Federal Court. It is interesting to note that on setting aside the transfer, the dispute between the caveator and the caveatee had from all appearances remained yet to be resolved by the court. We affirm once more the decision of *Woon Kim Poh* case.

Therefore it logically follows that the status quo before the presentation of the transfer in violation of the caveat should be restored ex debito justitiae on the mere fact of such violation on a motion to court without the necessity to explore the underlying transaction between the parties.

What happens, however, if the caveator, instead of moving the court for any transfer registered in violation of his caveat (prior to the determination of the rights of both caveator, caveatee and the transferee), to be set aside ipso facto, asks the court to adjudicate on the respective merits of the caveat, and of all parties, including the caveator and the transferee as happened in this case?

Then the court will determine the issues bearing on such merits and make the necessary orders as the justice of the case requires, such order being supportable in principle or on authority and also such orders may include the order for removal of the caveat.

Accordingly we have dealt with the issue of the assignment the validity of which we have earlier upheld. We now deal with the issue of the consent order, which is set out below.

Order

UPON READING the Originating Summons herein dated the 14th day of June 1973 and the joint Affidavit of applicants jointly affirmed on the 8th day of June 1973 and the joint Affidavit of the first and second respondents jointly affirmed the 22nd day of December 1973 all filed herein AND UPON HEARING Mr BG Martin of Counsel for the applicants and Mr Sidney Augustin of Counsel for the first respondent and Mr Shee Koon Ruay of

Counsel for the second, thirrd, fourth and fifth respondents BY CONSENT IT IS ORDERED that the application of the applicants for accounts be and is hereby withdrawn AND BY CONSENT IT IS FURTHER ORDERED that the application of the 1st and 2nd Respondents for leave be and is hereby granted to:

(i) transfer the lands under EMR No 4859 for Lot No 1035, EMR No 6048 for Lot No 3571 and EMR No 4140 for Lot No 3572 to 2nd, 3rd, 4th and 5th respondents in equal shares free from incumbrances at RM2 per square foot as agreed and the value of such equal shares to be off-set as part-payment against the shares due to them from the estate of Yap Cheng alias Yap Ching, deceased, and the estate of Ng Cheng Kim (f) (deceased) the deceased's first widow;

(ii) sell the land held under EMR No 5614 for Lot No 4185 by private treaty at a price of not less than RM6.50 per square foot as agreed and to distribute the net proceeds of sale thereof to the applicants and respondents proportionate to their shares as per para 10(a), 10(b) and 10(c) of Affidavit of the 1st and 2nd respondents affirmed on 22nd day of December 1973 filed herein taking into account part-payment effected to the 2nd, 3rd, 4th and 5th respondents pursuant to para (i) above.

And by consent it is lastly ordered that there be no order as to costs.

Given under my hand and the seal of the court this 24th day of December 1973.

—Sgd—
Senior Assistant Registrar,
High Court, Kuala Lumpur.

The complaint of the assignee before us is that the consent order is not valid and in effect he asks this court to brush it aside, inter alia, to have his name registered as a part owner of the four pieces of land pursuant to the assignment. An order of a superior court is always deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside. Bearing in mind, if the assignee is to succeed, the consent order would have to be set aside.

It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose: see eg *Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd* [1895] 2 Ch 273. The consent order was given in Originating Summons No 209/1973. It is now sought to have it set aside in the subsequent and separate civil suit concerned in the instant appeal. The civil suit is of course the fresh action for the purpose of setting aside the consent order.

The next question that arises naturally is that with regard to the relief of setting aside the consent order, seeing that he was not a party to the originating summons in which the consent order was made, can the assignee claim such a relief?

In our view, the assignee should have been made a party in the family

A settlement agreement and in the originating summons in place of the assignor who deliberately disowned the assignment. All the other parties were aware of the assignment because of another previous originating summons which was filed for distribution of the assets of the deceased father in accordance with the Distributions Act 1958. All such parties chose to treat the assignee as non-existent and to dispose of the interest of the B assignee without his knowledge and consent. We therefore hold that the assignee has the locus standi to claim the relief of setting aside the consent order.

Then, one would have to deal with the merits of such a claim of such relief more deeply.

C

A consent order is an order of the court carrying out an agreement between the parties. It used to be thought at one time that only a ground of fraud could cause a consent order to be set aside. It is now well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside, see eg again *Huddersfield Banking* D *Co.*

It is elementary that the first requisite of a contract is that the parties should have reached agreement which would involve an offer and acceptance of the offer, inter alia. The assignee had never reached such agreement with all the parties to the family settlement agreement and the family E settlement agreement purported to dispose of his beneficial interest without his knowledge and consent. Thus, not only that the family settlement agreement is not binding on the assignee because he was not a party to it, but it also attempted to dispose of his interest by the agreement, to be backed by the sanctity of a consent order of the court too. A situation of grave injustice was thus caused to the assignee by the family settlement F agreement and based on it, the consent order which was sought to be set aside. We cite below a case which we approve and adopt in this connection.

Thus in *Marsden v Marsden* [1972] 2 All ER 1162 a divorce case, counsel for the wife agreed to a consent order for her to release her charge on the matrimonial home and to be paid maintenance for herself and her G children. All these were contrary to her express instructions, and this was unknown to counsel for the husband. On the *same* day the consent order was extracted, either contemporaneously or some time before, the wife applied to set aside the consent order. It was set aside by the learned judge holding or approving the proposition that in such cases, the court had H power to interfere in setting aside the consent order for in the circumstances, grave injustice would be done by allowing the compromise to stand, although the limitation of counsel's authority was unknown to the other side. By the way, this case in another way seems to be an exception on its own facts to the rule that a consent order, when perfected, can only be set aside in a fresh action, and not in the same action in which the consent order was I made.

This case shows that even if lack of consent was unknown to the other

side, the court has the power to interfere with such a consent order where grave injustice would be caused by allowing the consent order to remain. This would be relevant to a theoretical position in our case if we assume for the sake of argument that apart from the administrators of the deceased father, all the other beneficiaries were unaware of the assignment.

We therefore propose that the family settlement agreement and the consent order ought to be set aside except for a serious impediment to such proposed course of action which will be presently dealt with.

The impediment is that, pursuant to the consent order, Tan Chong had bought and had itself registered as a proprietor of one of the four pieces of land, albeit in highly controversial circumstances and the said consent order, if set aside, would cause prejudice to Tan Chong when Tan Chong was entitled to and did accept the terms of the consent order without question as after all, even though a consent order is an order of court carrying out an agreement between the parties, it has become a command from a court of competent jurisdiction which should either be respected or obeyed.

While the family settlement agreement should be set aside undoubtedly for reasons given earlier but as regards the consent order, not only that justice of the case requires that that part of the consent order as providing for leave to sell that piece of land held under EMR 5614 at the price of RM6.50 per square foot ought to be retained, for reasons given in the preceding paragraph, but also it is quite justified on authority and in principle, when one bears in mind that it is the exclusive right of an administrator to decide to sell or not to sell any land in the course of his duty of administration of the estate of the deceased person in question and to apply for leave of court to do so without any necessity to obtain any agreement or consent from any residuary beneficiary of the estate, including as assignee of the interests of a residuary beneficiary.

We therefore come to the conclusion that the family settlement agreement should be set aside, but that in regard to the consent order, it should be set aside save expressly in regard to that part of the consent order that granted leave to sell EMR 5614 at the price stated therein.

Since this part of the consent order is thus saved from going overboard, it should render the purchase of EMR 5614 by Tan Chong valid, even if the transfer was registered in violation of the caveat as required by the justice of the case after this court has heard and decided on the merits of various parties. In this connection, we have indicated earlier that, in lieu of moving the court for setting aside, the transfer prior to the resolution of disputes among all the parties adverse to one another, the assignee chose to go the whole hog for a determination of rights inter se in a full action.

However, Tan Chong pushed through the registration of the transfer without applying to court to have the caveat first removed by the procedure as laid down in the Code thus contributing and leading to much acrimonious litigation. Such conduct should be disapproved and the court's disapproval should be reflected in the matter of costs. For a registering authority to

ignore a caveat in registering any dealing, apart from this potential liability for heavy damages to any person prejudiced thereby, we do not see why, in appropriate cases, a court should not recommend to the public services commission with a view to having some action being taken though we do not propose to do so in this case in view of the lack of that blatantness of conduct which would normally prompt one to do so.

We ought to say a few words about another ground of learned counsel for attacking the sale of EMR 5614 to Tan Chong, ie that the purchase price of RM900,000 for it as paid by Tan Chong was less than the expected total amount of the proceeds of sale of RM990,900 calculated on the basis of RM6.50 per square foot as per the consent order. Suffice it to say that the shortfall had been explained by the compensation payable in respect of the portion of land acquired by the city council to build a public road. The ground is therefore without any merit.

We propose to make certain orders later, and it will be seen that these orders will be the orders that the justice of this case requires but may not be the orders actually in terms as prayed for at the end of the statement of claim of the assignee, but we bear in mind that the court can grant any relief as required by the justice of this case so long as such relief is not inconsistent with the reliefs that are expressly asked for: see *Cargill v Bower* (1879) 10 Ch D 502.

The assignee claims the entitlement of shares of the assignor which is a $^{4}/_{42}$ (equal to $^{60}/_{630}$) share as residuary beneficiary in the intestate estate of the deceased father, and a further $^{1}/_{30}$ (equal to $^{21}/_{630}$) share in the same intestate estate of the deceased father by virtue of the assignor's share in the intestate estate of the deceased mother who had been shown to have no assets of her own except her own share in the intestate estate of her husband as one of the two surviving widows. The claim is based on the Distribution Act 1958 and the number of children and widows left by the deceased father are as enumerated by the learned judge in the judgment. The total resulting share of the assignor in the intestate estate of the deceased father would be $^{81}/_{630}$ share which of course has been sold and assigned to the assignee.

The assignee's proportion of $^{81}/_{630}$ as such has not been seriously disputed or denied in evidence and also submissions by all the other parties, eg no proportion other than this proportion has been suggested or put to the assignee at the trial while the assignor was giving evidence. The court will accept this proportion as correct.

We therefore give judgment as follows:

(1) that the appeal of the appellant be allowed and the order of the High Court dated 16 May 1992 be set aside;

(2) that the consent order dated 24 December 1973 and made in Kuala Lumpur High Court Originating Summons No 209/1973 be set aside save expressly in regard to its provision for granting leave to the first and second respondents to sell the land under EMR 5614 for lot

No 4185 by private treaty at the price of not less than RM6.50 per square foot;

(3) that the family settlement agreement annexed as exh A to the affidavit of the administrators to the estate of Yap Cheng also known as Yap Ching, deceased, and filed in aforesaid Originating Summons No 209/1973 be hereby declared as void and set aside;

(4) that this court declares that the appellant is entitled to a $^{81}/_{630}$ undivided share in the nett residue of the residuary estate of the estate of Yap Cheng alias Yap Ching deceased;

(5) that the transfer of EMR 5614 for lot No 4185 Mukim of Batu, from the estate of Yap Cheng alias Yap Ching deceased to the ninth defendant above-named do remain on the register and is upheld;

(6) that the court further declares that the nett residue of the residuary estate of Yap Cheng alias Yap Ching, deceased, comprises EMR 4859, 6048 and 4140 for lots 1035, 3571 and 3572 respectively all in the Mukim of Batu, District of Kuala Lumpur, and the proceeds of sale of land received from respondent No 9 after deducting all expenses of sale;

(7) that all respondents except respondent No 9, do forthwith pay a $^{81}/_{630}$ share of such proceeds of sale from the respondent No 9 to the appellant, if such proceeds of sale have been paid to such respondents;

(8) that the fifth respondents do within one month from this order execute a valid and registrable transfer each in respect of an undivided $^{81}/_{630}$ share in the three pieces of land described in order (6) preceding this order in favour of the appellant, and at the same time, an undivided $^{549}/_{630}$ of the same land to the administrators of the estate of Yap Cheng alias Yap Ching, deceased, at the expense and cost of the fifth respondents; the transfer of an undivided $^{549}/_{630}$ share aforesaid at the same time being merely for compliance with s 314 of the Code which prohibits a transfer of part and not the whole of any land;

(9) that the fifth respondents do deliver within one month from today to the appellant all documents of titles in respect of the said three pieces of land mentioned in order (9) above together with a certified copy of or the original of letters of administration to the estate of Yap Cheng alias Yap Ching, deceased, for enabling the appellant to present for registration the said transfers in pursuance of this order and for their return to the fifth respondents after such use;

(10) that all the respondents, except the ninth respondent, do pay costs to the appellant to be taxed in default of agreement; such costs are not to be borne by the estate of Yap Cheng alias Yap Ching, deceased;

(11) that there be no further order as to costs save as otherwise provided above in regard to the ninth respondent;

(12) that all parties be at liberty to apply for further directions, but only if necessary for implementing the orders herein.

Order accordingly.

Reported by Christopher Lin